UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 48 | Number 2 Article 11

2-1-1970

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directly question the defendant to determine whether he understands the significance of what he is doing in pleading guilty. Can one who has not been previously informed of the consequences of a plea of guilty (and it is this type of defendant that the rule was designed to protect) quickly weigh all the alternatives and then make the best decision? Some significant amount of time must be allowed him, the exact amount to be determined by such factors as his intelligence and previous experience.

Certainly the above problems will have to be resolved in order for the requirements of rule 11 to serve the interests of justice. In spite of these difficulties, the decisions in *McCarthy* and *Boykin* should benefit all parties involved in the process of guilty plea acceptance. In addition to setting forth a more or less uniform set of rules, the Court has provided significant safeguards for both the trial court and the defendant. By requiring an explicit set of inquiries to be made at the trial stage, the Court assured that future defendants will be better informed and thus presumably more able to make intelligent decisions. Trial court judgments will receive greater protection since a guilty plea under the requirements will likely be upheld against subsequent attacks.

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Decedents' Estates—Does North Carolina Law Adequately Protect Surviving Spouses?

Although the policy of freedom to distribute property at death is strong, a state may feel compelled to intervene if inadequate provision is made for the surviving spouse. At common law the surviving spouse was protected by the marital estates of curtesy and dower.[1] But with the advent of an industrial society, most state legislatures have perceived that these common-law protections have become outmoded. Land is no longer the principal asset of most estates, and, when it is, the marital estates often impose a restraint on its alienability thought undesirable by modern critics.[2] States have sought new means to protect a surviving spouse.[3] To this end, North Carolina has enacted the Intestate Succession Act,[4] which purports to promulgate this policy.

[1] *See generally* 25 AM. JUR. 2d *Dower and Curtesy* § 3 (1966).

[2] *See* 1 AMERICAN LAW OF PROPERTY § 5.5, at 332-34 (A. J. Casner ed. 1952); 3 VERNIER, AMERICAN FAMILY LAWS § 189, at 351-54 (1935).

[3] *See* 1 AMERICAN LAW OF PROPERTY § 5.5, at 332-34 (A. J. Casner ed. 1952); 3 VERNIER, AMERICAN FAMILY LAWS § 189, at 351-54 (1935).

[4] N.C. GEN. STAT. §§ 29-1 to -30 (1966) (chapter 29). *See also* N.C. GEN. STAT. § 30-1, -2 (1966), entitled "Surviving Spouses." These statutes were en-

The Act secures protection for a surviving spouse by two means: the intestate share and the qualified right to dissent. The intestate share consists of a large fraction (usually one-half or one-third) of the net estate,[5] the net estate being defined as "all property of a decedent . . . exclusive of family allowances, cost of administration, and all lawful claims against the estate."[6] If there is a will, the surviving spouse is offered the qualified right to dissent and to take a "forced share" generally equal to the intestate share.[7] North Carolina General Statutes section 30-1 limits the right to dissent to:

> . . . those cases where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator: (1) Is less than the intestate share of such spouse . . . .

The Act evidences two important legislative determinations. The first is the decision to accord financial protection to a surviving spouse while

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acted together, and, although only chapter 29 is entitled the "Intestate Succession Act," they will hereinafter be referred to collectively as the "Act." As of 1966 thirty-nine states, excluding the eight community property states and the civil-law state of Louisiana, had enacted similar statutory provisions to protect a surviving spouse. Plager, *The Spouse's Nonbarrable Share: A Solution In Search of a Problem*, 33 U. CHI. L. REV. 681 n.4 (1966).

[5] N.C. GEN. STAT. § 29-14 (1966).

> Share of the surviving spouse—The share of the surviving spouse shall . . . be as follows:
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> (1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, one half of the net estate, including one-half of the personal property and a one-half undivided interest in the real property; or
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> (2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, one third of the net estate, including one third of the personal property and a one-third undivided interest in the real property; or
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> (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children but is survived by one or more parents, a one-half undivided interest in the real property and the first ten thousand dollars ($10,000.00) in value plus one half of the remainder of the personal property; or
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> (4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent, all the net estate.

[6] N.C. GEN. STAT. §§ 29-2(2), (3) (1966).

[7] *See* N.C. GEN. STAT. § 30-3 (1966). When the testator is not survived by a lineal descendant or parent, or if the surviving spouse is a second or successive spouse and lineal descendants survive, the spouse, upon dissent, is entitled to only half his or her intestate share. In the former situation, the intestate share is computed before federal estate taxes are deducted. *Id.* The statute is interpreted in Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963).

recognizing the policy of freedom to distribute property at death. A surviving spouse can dissent from an adverse will and take an intestate share, and the legacies of the will to others remain effective although diminished pro rata.[8] The failure to consider the factor of need in the allotment of the forced intestate share indicates that this protection is accorded either upon the theory that the surviving spouse necessarily made a financial contribution to the deceased's wealth or on the ground of a post mortum extension of the deceased's lifetime obligation to support his spouse.[9]

The second determination is to include only property that can pass by intestate distribution in computing the surviving spouse's share, with one exception: A surviving spouse may dissent from the will if the aggregate value of what the spouse receives under it and "the property or interests in property passing in any manner outside the will" to the spouse as a result of the death of the testator is less than the intestate share.[10] Such property or interests always pass by contract or deed. Section 30-1(b) delineates some of these "outside properties":

> [B]y way of illustration and not of limitation, the following shall . . . be included in the computation of the value of the property or interests in property passing to the surviving spouse as a result of the death of the testator:
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> (1) The value of a legal or equitable life estate for the life of the surviving spouse;
> (2) The value of the proceeds of an annuity for the surviving spouse;
> (3) The value of proceeds of insurance policies on the life of the decedent received by the spouse;
> (4) The value of any property passing by survivorship . . . ;
> (5) The value of the principal of a trust under the terms of which the surviving spouse holds a general power of appointment over the principal of the trust estate;
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> except that no property or interest in property shall be so included to the extent that the surviving spouse or another in his behalf either gave or donated it or paid or contributed to its purchase price.

However, these "outside properties" can have a substantial impact upon the promulgation of the legislature's policy, and the failure to deal

[8] N.C. GEN. STAT. § 30-3(c) (1966).

[9] *See* Plager, *The Spouse's Nonbarrable Share: A Solution In Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

[10] N.C. GEN. STAT. § 30-1(a)(1) (1966).

adequately with them can render the statutes irrational in light of their purpose. *In re Estate of Connor*[11] illustrates the inconsistent results obtained under the Act and, more importantly, suggests a solution to the problem of effectively implementing its policy.

Connor died testate and was survived by his widow and a parent. Under the terms of the will his widow was named beneficiary of a trust. The trust principal, over which Mrs. Connor had a general testamentary power of appointment, was to be determined by a marital deduction formula, which would provide for the corpus an amount equal to the difference between the maximum marital deduction allowed under the federal estate tax laws and those interests that could be used in computing the deduction passing to the widow outside the trust.[12] In addition to the trust, Mrs. Connor received insurance proceeds and the sole ownership of survivorship property as a result of her husband's death.[13]

Mrs. Connor, apparently dissatisfied with the gift in trust, filed a timely dissent to the will. In support of her right to dissent, she argued that since her statutory intestate share was greater than one-half of the net probate estate, and that since the maximum marital deduction formula limited the value of properties passing to her as a result of her husband's death to one-half of the adjusted gross estate, she was entitled to dissent even without a valuation of the properties.[14]

The North Carolina Court of Appeals pointed out the fallacy of Mrs. Connor's argument: The net estate as determined for probate purposes and the adjusted gross estate as determined for federal estate tax purposes are not necessarily computed upon the basis of the same properties. Insurance proceeds and survivorship estates may be included in the adjusted gross estate and are, therefore, deductible under the marital deduction if certain requirements are met, but they are never included in the net probate estate. Accordingly, the value of the benefits passing to Mrs. Connor as a result of her husband's death, an amount equal to a maximum marital deduction, could have been greater than her intestate share, which was a portion of the net probate estate. If so, she

[11] 5 N.C. App. 228, 168 S.E.2d 245 (1969).

[12] INT. REV. CODE of 1954, § 2056, allows a fifty per cent marital deduction from the adjusted gross estate. For a definition of adjusted gross estate see INT. REV. CODE of 1954, § 2053.

[13] 5 N.C. App. at 228, 168 S.E.2d at 246-47.

[14] Brief for Appellant at 7, 8, *In re* Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1965).

was barred from dissenting. The court remanded for a determination of the two values.[15]

At first impression, *Connor* seems to illustrate a successful implementation of a policy that demands both financial protection for a surviving spouse and freedom for the deceased to distribute his property. According to the result, Mrs. Connor may dissent only if she did not receive the statutory minimum by contract, will, and deed as a result of her husband's death.

If dissent is ultimately permitted, however, the delicate balance of policy is upset. Section 30-3 entitles a dissenting spouse to a full intestate share in addition to the benefits passing by deed and contract. If the values of the insurance proceeds and joint estates are great and the testamentary bequest relatively small, Mrs. Connor will receive a substantial windfall that will deplete her husband's testamentary distribution to other beneficiaries.[16] The statute's inflexibility is magnified by the fact that the difference of even one dollar in outside property or in the net estate could trigger such an inequitable result.[17] Furthermore, an identical distribution would have been effected had Connor died intestate, except that Mrs. Connor would not have had to qualify for her windfall.[18] The legislature has allowed the existence of properties passing outside the net probate estate to defeat the policy behind the Act.

A greater deviation from the policy occurs if the surviving spouse does not benefit from the property passing outside the net estate. Instead of receiving a financial windfall, the spouse may be effectively disinherited. For example, if a large portion of a decedent's wealth has been invested in life insurance or in income-producing interests and the spouse is not a beneficiary, the net estate is diminished; and the surviving spouse receives only the same portion of the net estate as if the outside property

[15] 5 N.C. App. at 235, 168 S.E.2d at 250.

[16] If the net estate consisted of real property valued at 20,000 dollars and personal property valued at 10,000 dollars, Mrs. Connor could dissent if she received less than a value of 20,000 dollars by will, contract, and deed. *See* N.C. GEN. STAT. § 29-14(3) (1966), reprinted in full, *supra* note 5; and N.C. GEN. STAT. § 30-1(a)(1) (1966). If the properties passing by contract and deed were valued at 19,000 dollars and she were omitted from the will, upon dissent she would be entitled to 20,000 dollars in real and personal property plus the insurance proceeds and joint estates, a net total of 39,000 dollars.

[17] For example, in the fact situation of note 16 *supra*, if the "outside properties" were valued at 14,999 dollars, Mrs. Connor could dissent. But if they were valued at 15,000 dollars, the dissent would not be allowed.

[18] *See* N.C. GEN. STAT. § 29-14 (1966).

did not exist. Doubtless many a spiteful spouse has employed this technique to deprive his survivor of a fair measure of financial protection.[19]

These deleterious inconsistencies—the possibility of a windfall on one extreme and effective disinheritance on the other—are caused by inadequate legislative attention to interests in property that vest by operation of contract and deed. Such distortions of sound distribution policy can and should be corrected. Mrs. Connor's construction of the term "net estate" provides a solution. She based her argument upon the assumption that the net probate estate included the value of *all* benefits passing to her as a result of her husband's death.[20] The court in *Connor*, of course, was shackled by section 29-2. However, a net estate legislatively enlarged to include all interests passing to anyone as a result of a decedent's death to the extent the decedent owned them in fee at death, or contributed to their purchase price, would provide the flexibility lacking in the present statutes. All inconsistencies would be resolved whether the deceased died testate or intestate.

Suppose, for example, that a decedent died testate survived by only one lineal descendant and left an enlarged net estate valued at 30,000 dollars. The surviving spouse could dissent from the will if the value of benefits passing to her[21] was less than 15,000 dollars.[22] If the spouse were omitted from the will, but received 14,000 dollars in insurance proceeds, upon dissent she would be entitled to an intestate share valued at 15,000 dollars.[23] Because the surviving spouse has already received the insurance proceeds, a contribution of only 1,000 dollars in real and personal property would be required from the other beneficiaries to complete the allotment. The possibility of a windfall would be eliminated, and disruption of the testamentary distribution would be minimized.

If the decedent above had died intestate, the surviving spouse would receive the same portion of his wealth even if another person were the beneficiary of the insurance policy. Thus, if the enlarged net estate were valued at 30,000 dollars, the surviving spouse would again be entitled

[19] *See* Effland, *Estate Planning: Co-Ownership*, 1958 WIS. L. REV. 507; Goldman, *Rights of the Spouse and the Creditor in Intervivos Trusts*, 17 U. CIN. L. REV. 1 (1948); Vance, *The Beneficiary's Interest in a Life Insurance Policy*, 31 YALE L.J. 343 (1922).

[20] Brief for Appellant, *In re* Estate of Connor, 5 N.C. App. 228, 168 S.E.2d 245 (1969).

[21] Under N.C. GEN. STAT. § 30-3 (1966), both a surviving husband and a surviving wife are entitled to dissent. "Her" is employed in the text for convenience and not for limitation.

[22] N.C. GEN. STAT. §§ 29-14(3), 30-1(a)(1) (1966).

[23] *See* N.C. GEN. STAT. § 30-3(a) (1966).

to an intestate share of 15,000 dollars in real and personal property.[24] If the spouse were the beneficiary of life insurance proceeds amounting to 15,000 dollars, for example, she would receive no additional money. But if 15,000 dollars of the proceeds went to other persons, the surviving spouse would be entitled to an undiminished intestate share. As long as there are properties passing by intestate succession valued at an amount sufficient to equal an intestate share, the surviving spouse is not denied a minimum provision.[25]

Despite the advantages discussed above, one objection may be made to enlarging the net estate. The Intestate Succession Act provides an intestate share for the lineal descendants[26] and, in certain situations, for the parents of the deceased.[27] If a portion of the property passing to them by intestate succession were appropriated to make up a deficiency in the surviving spouse's minimum provision, the intestate shares of the beneficiaries would be diminished pro rata. The enlarged net estate would not have to be employed in this limited situation if the legislature found the appropriation undesirable. But since the surviving spouse is the principal beneficiary of the Intestate Succession Act, as only she can dissent from a will, it would not be a radical deviation from the theory of the Act to allow a lineal descendant's or parent's intestate share to be defeated. Furthermore, the threat of invasion of a child's or parent's share would deter schemes to disinherit the surviving spouse by depleting the enlarged net estate of properties that pass by intestacy.

The Intestate Succession Act does not now promulgate consistently the policy of providing economic security for the surviving spouse within a framework of freedom of property distribution at death. The flaws can be remedied if the net estate is redefined to include the value of all interests in property passing in any manner as a result of a decedent's death, to the extent that they were contributed by the deceased.[28]

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[24] *Id.*

[25] If there were 14,000 dollars of intestate property, the spouse would receive all of such property. Only a deficit of 1,000 dollars from a full intestate share would result. Obviously an estate planner could entirely defeat a surviving spouse's share by simply depleting the estate of property that can pass by intestacy. However, the legislature could remedy any remaining deficit by allowing an invasion of the "outside interests."

[26] N.C. GEN. STAT. §§ 29-15(1), (2) (1966).

[27] N.C. GEN. STAT. § 29-15(3) (1966).

[28] The problem of classifying gifts in contemplation of death would arise, but they, too, could be included within the enlarged net estate as properties passing "as a result of a decedent's death." *See* Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); MODEL PROBATE CODE § 33(b) (1946).